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not only avail itself of the rule of "reason and logic", but it can also justify its action when the position requires "extraordinary physical effort".[18] When the latter ground is the basis of the Commission's action, however, the selection of an age requirement must not be arbitrarily adjusted.[19] There is no absolute standard in determining the meaning of the phrase "extraordinary physical effort".[20] In the instant case the court indicated that the position of porter when compared with white collar occupations entails "extraordinary physical effort". It would seem that this comparison is a sound formula for interpreting the nature of positions requiring such effort.[21] The Commission acts justifiably where the position involves both light and laborious tasks.[22] "Extraordinary physical effort" need not be continuous, but must be available when needed.[23] Apparently, each case will have to be decided upon its own individual facts.

J. F. W.

MUNICIPAL CORPORATIONS—MUNICIPAL CIVIL SERVICE COMMISSION—CREDIT FOR EDUCATIONAL AND ATHLETIC TRAINING IN RELEVANT FIELDS—CIVIL SERVICE LAW.—This was a proceeding by the petitioners to cancel the notice of examination published by the Municipal Civil Service Commission, which notice provided for: (1) a credit [1] for educational training in relevant fields; (2) a similar credit for organized athletic training; and (3) fixed a maximum age limit of twenty-nine years for the list of special patrolmen in accor-

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[18] Deodati v. Kern, 280 N. Y. 360, 21 N. E. (2d) 355 (1939).
[19] *Id.* at 374, N. E. at 358.
[20] *Id.* at 373, N. E. at 358.
[21] A committee, composed of Assemblyman Wadsworth, co-author of Section 25A, and Senator Livingston, a co-sponsor of the bill, was appointed to assist the Commission in establishing a standard for positions requiring "extraordinary physical effort." The following was deemed to be a sound formula: "If the amount of the physical effort expended, or subject to be expended in the performance of the duties of a given position is considerably above that expended by bookkeepers, librarians, medical inspectors and statistical clerks, in the performance of their respective duties, or is comparable to the amount of physical effort expended, or subject or to be expended by street cleaners, policemen, firemen and prison guards in the performance of their respective duties, then the given position requires extraordinary physical effort." Instant case at 369.
[22] See note 20, *supra.*
[23] Instant case at 372.

[1] Mental test to have a weight of .7. Credit on a competitive basis will be added not exceeding .04 of the weight of the mental test, or .028 of the total weight.
The physical test will have a weight of .3. Credit not to exceed .04 of the weight of the physical test, or .012 of the total weight.

dance with Section 25a of the Civil Service Law.[2] The Appellate Division of the Supreme Court affirmed an order granting the applications of the petitioners.[3] On appeal, *held,* reversed. The credit proposed by the Civil Service Commission for educational and athletic training in relevant fields is based on qualifications and does not constitute a "bonus" [4] or "preference" so as to preclude the Commission from making such provisions,[5] and the fixing of a maximum age limit for the list of special patrolmen was within the discretion of the Commission.[6] *Thomas* v. *Kern,* 280 N. Y. 236, 20 N. E. (2d) 738 (1939).

The civil service laws are designed to remove the evils and inefficiencies of political appointments, and to establish a merit system as the basis of appointments to the civil service.[7] The constitution of New York provides for this mode of appointment and promotion.[8] The Commission is committed by law to determine the fitness and qualifications of applicants,[9] and their opinion concerning the proper age [10] or method of conducting tests [11] is not to be subordinated to the opinion of a jury unless they are obviously absurd and discrimina-

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[2] "Neither the state civil service commission nor any municipal civil service commission shall * * * discriminate against any person by reason of his or her age." N. Y. CIVIL SERVICE LAW § 25a.

[3] Matter of Thomas v. Kern, 256 App. Div. 801, 10 N. Y. S. (2d) 409 (1st Dept. 1939).

[4] "An extra consideration given for what is received, a gratuity." BLACK, LAW DICTIONARY (2d ed. 1910) 144.

[5] Thomas v. Kern, 280 N. Y. 236, 20 N. E. (2d) 738, 739 (1939) ("neither a bonus nor a preference, but a credit in lieu of experience").

[6] "Nothing herein contained, however, shall prevent such state or municipal commission from adopting reasonable minimum and maximum age requirements for positions such as policemen, firemen, * * *." N. Y. CIVIL SERVICE LAW § 25a.

Accord: Matter of Deodati v. Kern, 280 N. Y. 366, 21 N. E. (2d) 355 (1939) (where this rule was affirmed and applied to position of "porter, labor class").

[7] People v. Mosher, 163 N. Y. 32, 57 N. E. 88 (1900); 10 AM. JUR. (1937) p. 921, § 2.

[8] They "shall be made according to merit and fitness to be ascertained, *so far as practical,* by examinations, which, *so far as practical,* shall be competitive." (Italics are writer's.) N. Y. CONST. art. V, § 6 (1938).

[9] Laverty v. Finegan, 275 N. Y. 555, 11 N. E. 752 (1937), *aff'g,* 249 App. Div. 411, 292 N. Y. Supp. 412 (1st Dept. 1937). In Moriarity v. Creelman, 206 N. Y. 570, 577, 100 N. E. 446, 448 (1912), the court held that the Commission had the power to prescribe a minimum age limit of twenty-five years for the position of inspector. Accord: People *ex rel.* Shau v. McWilliams, 185 N. Y. 92, 99, 77 N. E. 785, 787 (1900) (the court said that where there is a fair and reasonable ground for difference, the determination of the Commission should be free from interference). See Matter of Bridgman v. Cosse, 157 Misc. 8, 283 N. Y. Supp. 226 (1935), *aff'd,* 246 App. Div. 632, 2 N. Y. S. (2d) 682 (2d Dept. 1935), *aff'd,* 271 N. Y. 535, 2 N. E. (2d) 682 (1936).

[10] People *ex rel.* Moriarity v. Creelman, 206 N. Y. 570, 577, 100 N. E. 446, 448 (1912).

[11] Matter of Sloat v. Board of Examiners of Board of Education of City of New York, 274 N. Y. 367, 9 N. E. (2d) 12 (1937).

tory.[12] The power of the Commission is discretionary, and not mandatory; it may require a written examination and a certification before issuance of a license.[13] In many instances, relative training is accepted as legally interchangeable experience. This principal has been applied to licenses for professional engineers,[14] master plumbers,[15] and law students.[16] Such training bears directly upon the qualifications for the position, and constitutes a valid test of relative merit and fitness. "The prime constitutional requirement is that the test be competitive." [17] A test to be competitive must be objective and conform to measures and standards capable of being reviewed and challenged when necessary.[18] It may be written or oral.[19] Oral "interviews" and teaching "tests" are sufficiently objective to satisfy the constitutional requirement of a competitive examination.[20]

The purpose of the Constitutional provision [21] is to improve the civil service of the state. Therefore, it is within the provisions and purpose that the examination should not entirely control when other and better methods would secure an improved service.[22] In *People* v. *Lyman,* the court reviewed and interpreted the language of the Constitution. Competitive examinations, if practical, must be the test; [23] but the language clearly implies that it is not always entirely practical to determine fitness and merit of an employee by mere examination, whether competitive or not. Thus, the examination shall control only insofar as it lends itself to the selection of proper employees,[24] and other methods [25] are to be used where they are reasonable and well calculated to materially aid in securing an improved service.

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[12] Matter of Bridgman v. Cosse, 157 Misc. 8, 283 N. Y. Supp. 226 (1935); Matter of Sloat v. Board of Education of City of New York, 274 N. Y. 367, 9 N. E. (2d) 12 (1937); Laverty v. Finegan, 275 N. Y. 555, 11 N. E. 752 (1937).

[13] Matter of Benedetto *et al.* v. Kern, 279 N. Y. 798, 19 N. E. (2d) 92 (1939).

[14] N. Y. EDUCATION LAW § 1452. Each complete year of study in a registered college may be accepted instead of one year of such experience.

[15] N. Y. ADMINISTRATIVE CODE § 816—3.0.

Ten years of experience may be offset by three years of experience and a technical degree.

[16] One year of graduate study may be accepted in lieu of one year of clerkship.

[17] See note 8, *supra.*

[18] Matter of Fink v. Finegan, 270 N. Y. 356, 361, 1 N. E. (2d) 462, 464 (1936).

[19] *Ibid.*

[20] See note 11, *supra.*

[21] See note 7, *supra.*

[22] People v. Lyman, 157 N. Y. 368, 52 N. E. 132 (1898) (an intricate study of the original intentions of the Constitutional committee in drawing the sections pertaining to civil service).

[23] Matter of Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921).

[24] People v. Lyman, 157 N. Y. 368, 382, 52 N. E. 132, 137 (1898); Laverty v. Finegan, 275 N. Y. 555, 11 N. E. 752 (1937).

[25] People v. Lyman, 157 N. Y. 368, 374, 52 N. E. 132, 134 (1898) (a probationary period was a reasonable method of determining fitness).

The determination of these qualities for which no objective standard or measure are available, rests in the discretion of the Municipal Civil Service Commission, subject to review by the courts in case of abuse.[26]

The provisions of the Commission in this particular instance, however, do not detract from the competitive examination form, because the list is made up of those whose merit and fitness has been duly ascertained, and only then are those who have the relative training in athletic or educational fields given the extra credit [27] (and this credit, too, on a competitive basis).[28] The test of fitness comes after and not before all applicants have had a fair opportunity to compete in an open competitive examination held pursuant to the rules of the Civil Service.[29]

It is apparent that the court saw in the refusal of the applications of the petitioners an opportunity to extend to the Police Department a personnel as able as is possible to obtain for "a person who has had such training, will for that reason, make a more useful policeman * * * in order to maintain law, order, and adequate protection for society against modern, organized criminals." [30]

H. L.

NEGLIGENCE—FORESEEABILITY OF RESULT—PROXIMATE CAUSE —ATTRACTIVE NUISANCE.—The infant plaintiff brought an action for personal injuries sustained when he, while lawfully on a public street, tripped and fell into a bonfire that had been built in the street by several other boys with gasoline they had stolen from a drip can on the unfenced premises of the defendant corporation. Plaintiff had not trespassed on the premises of defendant and had not aided in the

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[26] Fink v. Finegan, 270 N. Y. 356, 363, 1 N. E. (2d) 462, 465 (1936). Here the court held that the examiner's use of a non-competitive test to determine whether the applicant for medical examiner had force and executive ability was an abuse of discretion on the part of the committee. CIVIL SERVICE LAW §§ 9, 12.

[27] *In re* Keymer, 148 N. Y. 219, 42 N. E. 667 (1896).

[28] Instant case at 243. It appears in the record that educational training has always been used as a test of merit and fitness. In examinations for x-ray technicians, education and experience receive a weight of 4; junior and civil service examiner, a weight of 3 for education and experience; a credit of not more than five per cent was given to successful candidates in the last examination for firemen F. D., who had relevant engineering degrees from an accredited institution. Provisions for extra credit were incorporated into the HENDEL ACT, N. Y. Laws 1931, c. 798, § 19, as amended by N. Y. Laws 1936, c. 822, UNCONSOL. LAWS § 2471, which provides in part that "in the grading of eligible lists established as a result of civil service competitive examinations, a due credit shall be given for experience. * * *."

[29] Sheridan v. Kern, 255 App. Div. 57, 5 N. Y. S. (2d) 336, 341 (1st Dept. 1938); People v. Lyman, 157 N. Y. 368, 52 N. E. 132 (1898).

[30] Instant case at 241.